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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GILBERT KENNETH MORAN,

Plaintiff and Appellant,

v.

THE PERMANENTE MEDICAL GROUP,
INC.,

Defendant and Respondent.

F068748

(Super. Ct. No. CV-270393)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Pine & Pine, Norman Pine, Scott Tillett; The Matthews Law Group, Charles T. Matthews; The Rager Law Firm and Jeffrey A. Rager for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, David R. McNamara and Scott M. Reddie for Defendant and Respondent.

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Appellant, Dr. Gilbert Kenneth Moran, filed a complaint for defamation and intentional interference with prospective economic advantage against his former employer, The Permanente Medical Group (TPMG). According to Moran, a TPMG employee, Dr. Hamid Safari, sabotaged Moran's career at the Southern California

Permanente Medical Group (SCPMG) by bad-mouthing Moran to a close friend who was employed by SCPMG.

The trial court granted TPMG's summary judgment motion. The court concluded that Moran had not alleged actionable defamation because the objected to statements were either true or were mere opinions.

On appeal, Moran contends the trial court failed to apply binding authority concerning statements that may look like opinions but nevertheless imply verifiably false statements. Moran further argues the court erred in finding certain statements true by giving them a narrow and literalistic reading.

We conclude the trial court properly granted summary judgment. Accordingly, the judgment is affirmed.

BACKGROUND

TPMG is a corporation whose doctors provide medical care for Kaiser Foundation Health Plan members in Northern California. SCPMG is a partnership whose doctors provide medical services to Kaiser Foundation Health Plan members in Southern California.

Moran is licensed in obstetrics and gynecology (ob/gyn). From 1991 until January 2007, Moran worked for TPMG. During his tenure, Moran served as chief of the ob/gyn department.

Starting in 2001, while serving as the TPMG ob/gyn department chief, Moran began voicing concerns about the care being provided by Safari, a TPMG perinatologist. Moran complained to Dr. Varoujan Altebarmakian, the TPMG physician in chief, on a number of occasions. Patient incidents in 2002 led to Safari being the subject of two peer review proceedings.

According to Altebarmakian, while Moran served as the ob/gyn department chief, Safari and others complained that Moran was using the peer review process to punish physicians. At that time, the peer review committee was made up of Moran and three

other physicians. Due to these complaints, in October 2003 Aldebarmakian changed the peer review committee structure from four physicians to all the physicians in a department.

In May 2004, Moran was removed as chief of the ob/gyn department.

In April 2005, an infant death resulted in peer review of Safari. Restrictions were thereafter placed on Safari's hospital privileges.

In July 2005, Moran received a two-week disciplinary suspension because of conduct that violated TPMG's medical records confidentiality policy. Moran had accessed the medical records of both the infant who died in April 2005 and the infant's mother.

Moran and Safari had a contentious relationship. Safari believed Moran had treated him unfairly and blamed Moran for destroying his career. Meanwhile, Moran felt that he had become the target of retaliation.

Moran resigned from TPMG in January 2007 and was hired by SCPMG.

One of Safari's close friends, Dr. Omid Hakimian, worked as an ob/gyn at SCPMG. Safari made negative comments about Moran to Hakimian. Safari told Hakimian that Moran: used peer review to try to intimidate people; used peer review "as a weapon" against other physicians; alienated physicians against each other; used the staff against physicians; and was "abusing his power as chief." Safari also told Hakimian that a nurse had alleged she had been sexually harassed by Moran.

In May 2007, Moran filed a complaint against TPMG (*Moran I*). Moran claimed that, because of his efforts to expose the alleged incompetence of Safari, TPMG retaliated against him to protect Safari. The complaint also included a defamation cause of action alleging that: TPMG's representatives "made unprivileged comments stating that both Plaintiffs were rogue physicians, acting outside of the bounds of the policies and procedures of Defendants, in an effort to harass a colleague"; Moran was "wrongfully accused of sexual harassment for incidents that actually related to Dr. [Safari's] creation

of a sexually charged hostile work environment;” and numerous publications of these statements were made to third-persons. The parties settled *Moran I* in June 2009 and Moran signed a general release of all claims relating to the subject matter of the action.

When Moran was hired by SCPMG in January 2007, he was given two years of credit toward partnership. Thus, he would be eligible to become a partner in January 2008.

In late 2007, during a closed SCPMG partner meeting, a question was raised about sexual harassment allegations against Moran when he was at TPMG. Dr. Julia Bae, the area medical director at SCPMG, spoke with Moran about the allegations. Moran provided Bae with copies of the four letters he had received regarding sexual harassment allegations while working at TPMG. Bae had someone from SCPMG investigate these allegations and was told there were two incidents where Moran was counseled.

SCPMG delayed a final vote on Moran’s partnership. Three times between early 2008 and January 2010, SCPMG conducted straw ballots. Each time Moran failed to obtain support of the department. Because Moran did not receive the support of the SCPMG partners in his department, he was given the option of resigning or being terminated. Moran refused to resign and was terminated in February 2010.

In October 2012, Moran filed the underlying first amended complaint against TPMG for defamation and intentional interference with prospective business advantage. Regarding the defamation cause of action, Moran alleged:

1. Safari told Hakimian that Moran “was involved in sexual harassment at Kaiser-Fresno;”
2. Safari published to Hakimian that Moran “used peer review to inappropriately punish people he did not like at TPMG Fresno;”
3. Safari published to Hakimian that Moran “used peer review to inappropriately punish him unfairly at TPMG Fresno;”

4. TPMG shareholder Dr. Daryoush Razi published to Hakimian that “it was a possibility that Dr. Moran would use peer review against Dr. Hakimian in an unfair and arbitrary manner;”

5. Razi published to Hakimian that Moran “had unfairly caused problems for Dr. Safari leading to the restriction of his privileges at TPMG;” and

6. Safari and Razi told Hakimian that Moran “had engaged in workplace behavior that was ‘negative’ at Kaiser-Fresno.”

Moran further alleged that Hakimian repeated these statements at SCPMG general partnership meetings and that, as a result, Moran was not offered partnership at SCPMG.

TPMG moved for summary judgment. TPMG argued there were no disputed material facts and that the claims were barred on the following grounds: (1) the settlement and general release in *Moran I* barred the claims; (2) the defamation claim was time barred; (3) the alleged defamatory statements were statements of opinion and/or were true statements; (4) the alleged defamatory statements were privileged; (5) no alleged defamatory statements were made in the course and scope of employment; and (6) to the extent the defamation claim was barred, then so was the intentional interference claim.

The trial court granted TPMG’s motion. The court ruled the alleged defamatory statements were either truthful or opinion. The court found that the statement allegedly made by Safari that Moran was involved in sexual harassment at TPMG was truthful. The court noted that Moran admitted that sexual harassment complaints had been lodged against him and ruled that whether there was any basis for these complaints was irrelevant. The court concluded that the remaining statements were opinions and therefore not actionable. Regarding the cause of action for intentional interference with prospective economic advantage, the court ruled that, because there was no defamation, Moran could not establish that an intentional act designed to disrupt the relationship occurred.

DISCUSSION

A party moving for summary judgment bears the burden of persuading the trial court that there is no triable issue of material fact and that he or she is entitled to judgment as a matter of law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.) Once the moving party meets this initial burden, the burden shifts to the opposing party to establish, through competent and admissible evidence, that a triable issue of material fact still remains. If the moving party establishes the right to the entry of judgment as a matter of law, summary judgment will be granted. (*Ibid.*)

As the reviewing court, we must assume the role of the trial court and reassess the merits of the motion. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) We apply the same legal standard as the trial court to determine whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. Thus, we first identify the issues framed by the pleadings since its these allegations to which the motion must respond. Next, we determine whether the moving party's showing has satisfied its burden of proof and justifies a judgment in its favor. Finally, we determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Id.* at p. 1602.) We must view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.)

To state a defamation claim, a plaintiff must present evidence of a statement of fact that is provably false. (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809 (*Seelig*).) However, because there is no such thing as a false idea under the First Amendment, statements of opinion are constitutionally protected. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259-260 (*Baker*).) Accordingly, true statements and statements of opinion are not actionable as defamation.

However, statements of opinion do not enjoy blanket protection. (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 862 (*Sanders*).) Rather, "expressions of 'opinion'

may often imply an assertion of objective fact.” (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18.) A false statement of fact, whether expressly stated or implied from an expression of opinion, is actionable. (*Id.* at p. 19.) “The key is not parsing whether a published statement is fact or opinion, but ‘whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.’” (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 701.)

To determine whether a statement communicates or implies a provably false assertion of fact, courts use a totality of the circumstances test. (*Seelig, supra*, 97 Cal.App.4th at p. 809.) “First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense.” (*Baker, supra*, 42 Cal.3d at p. 260.) Next, the court must consider the context in which the statement was made. The court looks at the nature and full content of the communication and the knowledge and understanding of the audience to whom the publication was directed. (*Id.* at p. 261.)

Generally, whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide. (*Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385.) However, if the statement is susceptible of both an innocent and a defamatory meaning, the jury must decide how the statement was understood. (*Ibid.*)

In sum, the crucial question is whether, under the circumstances, a reasonable fact finder could interpret the published statement as declaring or implying a provably false fact about the plaintiff. (*Sanders, supra*, 219 Cal.App.4th at p. 863.)

Moran argues that Safari’s affirmative statements regarding Moran’s abuse of peer review, i.e., using it as a weapon against physicians and to try to intimidate people, implied statements of fact. Moran further contends Safari implied provably false facts when he stated that Moran used the staff against physicians and engaged in negative

workplace behavior. Moran sums up Safari's statements as accusing Moran of abuse of TPMG's peer review process and abuse of the office of chief of the department.

It is undisputed that Safari was the subject of multiple peer review proceedings and that Moran repeatedly expressed his concerns regarding Safari's competence. These are provable facts. However, when Safari accused Moran of abusing peer review and using it as "a weapon," Safari was questioning Moran's motive for instigating peer review. Moran's thought process in this regard is not a provable fact. Rather, Safari was expressing an opinion.

Similarly, Safari's statements accusing Moran of alienating physicians and engaging in negative workplace behavior, i.e., abusing his power, are not actionable. Whether behavior is "negative" or "alienating" requires a subjective assessment. What one person perceives as negative another may perceive as laudable or appropriate. These statements reflect Safari's personal belief based on his evaluation of Moran's actions. The statements are not based on facts capable of being proved true or false.

In sum, no reasonable finder of fact could interpret Safari's comments accusing Moran of abusing peer review and his position of chief of the ob/gyn department as stating provable facts about Moran. Accordingly, these comments are not actionable.

Safari's statement that a nurse had alleged that Moran had sexually harassed her is also not actionable. Moran admitted that complaints of sexual harassment had been lodged against him. Thus, this statement is true. The fact that the sexual harassment allegations were determined to be unfounded does not make the objected to statement false. Therefore, the trial court properly entered summary judgment in TPMG's favor on the defamation cause of action.

Summary judgment was also properly entered on Moran's cause of action for intentional interference with prospective economic advantage. Moran's claim that TPMG intentionally and wrongfully acted to disrupt Moran's relationship with SCPMG, an element of the tort, is based on the alleged defamation. (*San Jose Construction, Inc. v.*

S.B.C.C., Inc. (2007) 155 Cal.App.4th 1528, 1544-1545.) Since Moran cannot establish defamation, he cannot establish intentional interference with prospective economic advantage.

In light of this conclusion, we need not decide whether the other grounds raised by TPMG would also entitle TPMG to summary judgment.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

FRANSON, J.

WE CONCUR:

GOMES, Acting P.J.

DETJEN, J.